UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AT&T COMMUNICATIONS OF NEW JERSEY, INC. Plaintiff STATE OF NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE Plaintiff-Intervenor v. BELL ATLANTIC-NEW JERSEY, INC., and THE NEW JERSEY BOARD OF PUBLIC UTILITIES, an agency, and HERBERT H. TATE AND CARMEN J. ARMENTI, in their official capacities as Commissioners of the Board of of Public Utilities. Defendants.	)	ORIGINAL FILED JUN 30 2000 WILLIAM T. WALSH, CLERK Civil Action No. 97-5762 (JAG) **NOTICE OF APPEAL**

Notice is hereby given that the State of New Jersey Division of the Ratepayer Advocate, plaintiff-intervenor in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on the 6th day of June, 2000.

Respectfully submitted,

Blossom A. Peretz, Director
DIVISION OF THE RATEPAYER ADVOCATE

By: Heikki Leesment
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Dated: June 30, 2000

FILED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUN 6 2000

AT 8:30 .... M
WILLIAM T. WALSH
CLERK

AT&T COMMUNICATIONS OF NEW JERSEY, INC., et al., Plaintiffs, v. BELL ATLANTIC-NEW JERSEY, INC., et al., Defendants.	:	Civ. No. (KSH)
MCI TELECOMMUNICATIONS CORP., et al., Plaintiffs, v. BELL ATLANTIC-NEW JERSEY, INC., et al., Defendants.	:	

ORDER

ENTERED
ON
THE DOCKET

JUN 6 2000

WILLIAM T WALSH, CLERK
By (Deputy Clerk)

THIS MATTER having been brought before the Court on review of the New Jersey Board of Public Utilities' approval of the interconnection agreements between Bell-Atlantic New Jersey and AT&T and between Bell-Atlantic New Jersey and MCI pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6), the Court having reviewed the written submissions of the parties and having entertained oral argument on the issues, and for the reasons expressed in the Opinion filed herewith,

IT IS on this 6th day of June, 2000 hereby

ORDERED that the Board's decision to substitute generic rates for the arbitrated rates in the AT&T - Bell Atlantic interconnection agreement is **affirmed**; and it is further

ORDERED that the Board's decision to deny shared two way trunking is **affirmed**; and it is further

ORDERED that the Board's decision regarding the number of interconnection points per LATA is **affirmed**; and it is further

ORDERED that the challenge to the Board's decision on the electronic database dump is dismissed as **moot**; and it is further

ORDERED that the Board's decisions not to require dark fiber and subloop unbundling are **reversed** and remanded for proceedings consistent with this Opinion and the FCC's Third Report and Order; and it is further

ORDERED that the Board's decision to set rates based 60% on the Bell model and 40% on the Hatfield model is **reversed** and the recurring and non-recurring rates are remanded to the Board for proceedings consistent with this Opinion; and it is further

ORDERED that the issue of customer specific pricing agreements and fill factors for distribution cable are **remanded** for further proceedings consistent with this Opinion.

KATHARINE S. HAYDEN, USDJ

FIG

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

AT&T COMMUNICATIONS OF NEW JERSEY, INC., et al., Plaintiffs, v. BELL ATLANTIC-NEW JERSEY, INC., et al., Defendants.	Civ. No. 97-5762 (KSH)
MCI TELECOMMUNICATIONS CORP., et al., Plaintiffs, v. BELL ATLANTIC-NEW JERSEY, INC., et al., Defendants.	Civ. No. 98-0109 (KSH) OPINION

ORIGINAL FILED
JUN 6 2000
WILLIAM T. WALSH, CLERK

Katharine S. Hayden, District Judge:

I Introduction

These consolidated actions are brought by AT&T Communications of New Jersey, Inc. ("AT&T") and MCI Telecommunications Corp. ("MCI") pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 251 et seq., for judicial review of their respective interconnection agreements with Bell Atlantic New Jersey ("Bell") for the provision of local telephone service, as approved by the New Jersey Board of Public Utilities (the "Board").

Jurisdiction arises under § 252(e)(6) of the Act, which grants district courts the authority to review the decisions of state Boards for compliance with the Act. For the reasons discussed below, the Board's decision will be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

II Procedural History

Anticipating the competition for local telephone service that would result from the passage of the then pending Telecommunications Act, the New Jersey Board of Public Utilities began an investigation on December 8, 1995 to determine appropriate terms for local telephone service competition in the state. By Order of June 19, 1996 the Board set in motion a comprehensive hearing process, or "generic" proceeding, to set generally available rates and conditions for new market entrants in New Jersey without the need for negotiation and arbitration of individual interconnection agreements as provided for in the federal statute. At the time of its June Order, the Board's official position was that the generic proceeding would have no precedential affect on any agreements already in arbitration. See June 20, 1996 Decision and Order at 2. But two months later the Board moved away from this position in an August 7, 1996 Order:

> The information developed in this proceeding may well be relevant in assisting the Board to avoid disparate or inconsistent decisions with respect to the issues in those arbitrations. Moreover, the generic proceedings will provide an avenue by which parties not participating in negotiations and arbitrations can apprise the Board of important concerns on the very issues that the Board will later consider in its review of the agreements.

August 7, 1996 Prehearing Order at 3. Despite the Board's stated intent to use information from the generic proceedings in reviewing and adopting or rejecting the content of any arbitration award, AT&T maintains that it did not believe these generic rates would affect it because AT&T was already negotiating an agreement with Bell.

As early as 1995, AT&T had begun private negotiations with Bell on an interconnection agreement for local service. On March 1, 1996, shortly after the passage of the Act, the parties instituted formal negotiations under the Act. They reached a stalemate on rates and -- as the Act provided for -- submitted the matter for arbitration. The New Jersey Board of Public Utilities ordered the parties to arbitration on August 15, 1996, and selected retired Superior Court Judge Paul Thompson to serve as arbitrator. During the proceedings, AT&T submitted various cost models, while Bell only submitted evidence to undermine the AT&T models rather than a comprehensive model of its own. Judge Thompson's November 8, 1996 decision adopted the rates from the AT&T model and incorporated them into the interconnection agreement. Bell refused to sign the interconnection agreement. Instead it petitioned the Board to plug in FCC interim rates rather than the arbitrator-approved rates until the generic proceedings were complete, at which point Bell proposed that the agreement could incorporate those generic rates.

Meanwhile, in March, 1996 MCI had requested negotiation for interconnection with Bell. Because the parties disputed which elements MCI should have access to and the rates it should pay, negotiations failed and the parties requested arbitration under the Act on August 27, 1996. The Arbitrator issued a decision on December 19, 1996 which provided that FCC interim rates would govern the Bell/MCI agreement until the Board established permanent rates in the generic proceeding. On July 1, 1997 the parties submitted an interconnection agreement to the Board that included the FCC rates as "interim" rates pending the outcome of the generic proceeding.

While these efforts to negotiate individual interconnection agreements were ongoing, MCI, AT&T and Bell were also participating in the concurrent generic proceedings the Board had set in motion, providing various cost models to the Board and offering witness testimony on both pricing and technical issues. Board Commissioner Carmen Armenti presided over the twenty five days of hearings held from September of 1996 to February of 1997. The generic proceedings concluded at the July 17, 1997 agenda meeting, when the Board announced its formal rate findings. These findings were published in a formal Decision and Order on December 2, 1997 (the "Generic Order"). Because AT&T and Bell hadn't yet agreed on rates and submitted a duly executed interconnection agreement, the Board applied the generic rates to the AT&T - Bell agreement. Generic Order at 254. The generic rates that the Board set were significantly higher than the rates that Judge Thompson had awarded AT&T in arbitration.

In response to the Board's ruling, Bell and AT&T each submitted what purported to be "the" interconnection agreement between the parties for the Board's approval as follows: on July 25, 1997 AT&T submitted an agreement that contained the arbitrated rates, and on August 5, 1997 Bell submitted its own version of the agreement using the generic rates. At a September, 1997 meeting, the Board reaffirmed its decision to substitute the generic rates for the arbitrated rates in the parties' interconnection agreement. So, AT&T signed the agreement containing the generic rates under protest, and the Board approved it on December 22, 1997. And although MCI also disputed the generic rates set by the Board, MCI likewise used them it its agreement with Bell. The Board approved that agreement on November 20, 1997.

AT&T filed suit in this court on November 24, 1997 challenging the Board's authority to substitute the generic rates for those it won in arbitration and opposing the rates and technical rulings of the generic proceeding. MCI filed suit in 1998, also challenging the Board's generic rates and rulings on technical issues. The matters were consolidated on March 1, 1999. The New Jersey Ratepayer Advocate was added as a plaintiff, and the Federal Communications Commission appears as amicus. All parties have submitted briefs on the issues and oral argument was held with all parties participating.

III The Governing Law

A. The Telecommunications Act of 1996

The Telecommunications Act of 1996, codified at 47 U.S.C. § 251 et seq., was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local phone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." Iowa Utilities Board v. FCC, 120 F.3d 753, 791 (8th Cir. 1997); rev'd in part sub nom. AT&T v. Iowa Utilities Board, __ U.S. __ , 119 S.Ct. 721 (1999). Because construction of a parallel local network would be costly and would delay competition for local service, the Act provides a variety of methods for competing phone service companies to offer local telephone service without a complete duplication of the existing local network. The Act mandates that a competing local exchange carrier ("CLEC" or "competitor") be permitted to interconnect its facilities with those of the incumbent local exchange carrier ("ILEC" or "incumbent") "at any technically feasible point," 47 U.S.C. § 251(c)(2)(B); to purchase the ILEC's individual network elements on an "unbundled" basis, 47 U.S.C. §251(c)(3); to purchase ILEC services at wholesale prices for resale to CLEC customers at retail rates, 47 U.S.C. §251(c)(4); and to construct facilities necessary for interconnection on the ILEC's premises ("collocation"), 47 U.S.C. § 251(c)(6).

The Act creates a multi-step process through which a CLEC gains use of the ILEC's network and services. The parties must first negotiate the terms and conditions of an interconnection agreement in good faith. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If the negotiations fail either party is entitled to arbitration of the unresolved issues pursuant to 47 U.S.C. § 252(b). The parties then submit the arbitrated interconnection agreement for approval to the state commission responsible for regulation of public utilities, 47 U.S.C. § 252(e)(1), and any party taking issue with the final agreement as approved by the state commission may seek judicial review in federal district court as provided in 47 U.S.C. § 252(e)(6).

B. District Court Standard of Review

Neither the United States Supreme Court nor the Third Circuit has addressed the standard of review which a district court should employ in reviewing an interconnection agreement brought under the Act, and so a brief discussion of the standard is warranted. The Act offers little guidance with respect to a district court's role in reviewing an interconnection agreement before it, stating only that

> [i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). The statute is silent as to the standard of review that a district court must employ. Other district courts faced with review of a state agency decision under the Act have applied an arbitrary and capricious standard of review to factual findings, and a de novo standard of review to legal conclusions.[1] The parties do not object to this standard of review.

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[1] See e.g., Bell Atlantic-Delaware, Inc. v. McMahon, No. 97-511-SLR (D. Del. Jan. 6, 2000); AT&T Comm. of California v. Bell, No. C97-80 SI, 1998 WL 246652, (N.D. Cal. May 11, 1998); US West Comm. v. TCG Seattle, No. C97-354WD (W.D. Wash. Jan. 22, 1998); MCI v. US West Comm., No. C97-1508R (W.D. Wash. July 21, 1998); US West Comm. v. AT&T, No. C97-132OR (W.D. Wash.

The reasoning of the cases, which this Court finds persuasive and adopts, is that in the absence of a statutorily defined standard, an "arbitrary and capricious" standard of review is appropriate for agency factual findings. See The Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Under that standard there must be a rational connection between the facts found and the decision rendered. Motor Vehicle Mfrs. Ass'n. V. State Farm Mut., 463 U.S. 29, 43 (1983). If the agency's decision was based on the relevant factors and a reasonable basis exists for its decision, the Court should uphold the agency's factual findings. This deferential standard is appropriate because the Act gives state agencies original jurisdiction in the area of rate-setting, traditionally an area of state expertise. 47 U.S.C. § 252(c)(2).

With respect to the Board's legal conclusions, a de novo review is appropriate because a state agency's interpretation of federal law is not entitled to the deference generally accorded to a federal agency under Chevron, U.S.A.. Inc. v. Nat. Resources Defense Council, 467 U.S. 837, 844 (1984). Unlike federal agencies, state commissions do not have experience in implementing federal policy and are not subject to congressional oversight. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997). Moreover, as the federal courts have a more national perspective than state regulatory commissions, a de novo standard of review ensures a more uniform application of the Act nationwide. See AT&T of the S.Cent. States, Inc. v. BellSouth, 20 F.Supp. 2d 1097, 1100 (E.D. Ky. 1998); see also Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1998)(state agencies lack "the expertise in implementing federal laws and

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July 21, 1998); Southwestern Bell v. AT&T, No. A 97-CA-132 SS, (W.D. Tex. Aug. 31, 1998); MCI and AT&T v. Bell Atlantic-Virginia, No. 3:97CV629 (E.D. Va. July 1, 1998); MCI v. GTE, No. C97-742WD (W.D. Wash. July 7, 1998); AT&T v. BellSouth, No. 5:97-CV-405-BR, 1998 WL 300218(3) (E.D. N.C. May 22, 1998); US West Comm. v. Hix, et al., No. 97-D-152 (D. Colo. Dec. 5, 1997); MCI v. Bell Atlantic-Virginia, No. 3:97CV629 (E.D. Va. Dec. 24, 1997).

policies and the nationwide perspective characteristic of a federal agency").

IV Discussion

AT&T, MCI, and the Ratepayer Advocate all seek an Order of this Court overturning the Board's approval of the interconnection agreements. Each claims that the Board erred in applying the Act to a variety of issues. The Court will address each of the issues raised, which fall roughly into categories of procedural issues, technical issues, and pricing issues.

A. Procedural Issues

1. AT&T, Ratepayer Request to Reinstate Arbitration Award

AT&T and the Ratepayer Advocate ask this Court to overturn the Board's approval of the interconnection agreement with the generic rates and reinstate the agreement that AT&T received through arbitration. AT&T argues that it relied on the Board's August 1996 position that the generic proceeding would have no precedential affect on agreements already in arbitration, and would not have undertaken the time and expense of arbitration if it believed the generic proceeding results would ultimately supersede the arbitration proceedings. The Board responds that AT&T's active participation in the generic proceedings undermines its claimed reliance argument, and contends AT&T was aware of the Board's formal announcement that it would consider the findings of the generic proceeding in adopting or rejecting any agreement submitted for its approval. AT&T counters that it continued to participate in the generic proceeding because it assumed that *consideration* of generic rates did not mean wholesale *substitution* of the rates.

Reliance arguments notwithstanding, AT&T and the Ratepayer Advocate claim that the Board was wholly without authority to substitute the generic rates for the rates AT&T won in arbitration, and that the Board was obligated to approve the arbitrated agreement. But the arbitration procedure requires the parties to submit a duly executed agreement for approval to the Board, and AT&T and Bell never did. Instead they submitted *two* agreements with conflicting rates. So the Board claims it was well within its authority to resolve the disputed rates with the generic prices. Further, even if the parties had executed an agreement based on the arbitration award, the Board insists it could have rejected or modified any part of it if it found the award to be inconsistent with the Act. Without addressing the merits of the generic rates as yet, the Court will affirm the Board's decision to substitute generic rates for arbitrated rates as a proper exercise of authority under the Act.

The Court's conclusion is based squarely on what the Act provides. The Board has independent authority to impose additional requirements not inconsistent with the Act under § 261(c), and it has an obligation to ensure that any agreement submitted for approval, whether negotiated or arbitrated, complies with the Act. Under § 252(c)(1), a State commission is required to ensure that any arbitrated agreement complies with § 251, encompassing an ILEC's obligation to provide a CLEC access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory. Section 252(e)(2)(B) gives a State commission authority to approve or reject any arbitrated agreement if the agreement does not meet the requirements of § 251, the regulations prescribed by the FCC, or the pricing standards of § 252(d). These two sections of the Act gives a state Board broad authority to examine every aspect of an interconnection agreement for fairness of itsterms and rates.

Here, the Board exercised exactly that authority. In the arbitration, because Bell had not put forward a comprehensive model of its own during arbitration, Judge Thompson awarded rates wholly from the AT&T Hatfield model. Given the Act's mandate to the Board, it would have been inappropriate for the Board to approve an arbitrated agreement which assumed the validity of only one party's proposed rates. By the time Bell and AT&T submitted their respective agreements for approval, the generic proceedings had revealed engineering problems with the Hatfield model that Judge Thompson's findings rested on. The Board's decision not to approve rates from a model which was problematic is consistent with its authority under the Act.

Contrary to AT&T's argument on the Board's timeliness, the Court finds that § 252(b)(4)(C), which requires that resolution of matters committed to arbitration be resolved by the state commission within nine months, does not invalidate commission action outside of that period. The nine month period ensures that interconnection issues will be resolved expeditiously, consistent with the Act's goal to jumpstart local competition. The Board committed the AT&T - Bell agreement to arbitration in August 1996, and its decision to substitute for the arbitrated rates came in July 1997, two months after the statutory period, not a significant delay.

Further, §252(b)(4)(B) provides that a state commission may require information from the parties "as may be necessary for the State commission to reach a decision on the unresolved issues." If a state commission determined that it had insufficient information to resolve the issues within the nine month period prescribed in § 252(b)(4)(C), the commission ought to be allowed to obtain the information rather than be forced to decide based on just the information that was gathered by the deadline. AT&T's argument that the commission was obligated to adopt the arbitrated agreement because it had a nine month deadline and the Hatfield model rates were the "best information available" within that time frame, is simply not a reasonable interpretation of the statute. Under section 252(b)(4)(B), if any party refuses or fails to respond on a timely basis to a request for information from the commission, the commission *may* proceed on the basis of the best information available to it, from whatever source derived. Read as a whole, §252(b)(4) lays a framework for making an informed decision on a reasonably expedited basis. The Board's decision to use rates derived from the comprehensive proceeding was consistent with its obligation under the statute to obtain all necessary information. That this took eleven months rather than nine months is outweighed by the benefit to the Board of having comprehensive information for its decision.

AT&T has argued that under § 252(e)(1) the Board may only reject an agreement if it finds it does not comply with § 251, FCC regulations, or pricing standards under § 252(d), and that the Board must state the deficiencies in writing. I find that the Board met this obligation when it published its opinion on December 2, 1997, incorporating decisions announced earlier that year in July and September. Generic Order at p. 62-64. Because the Board acted within its statutory authority to determine fair and reasonable rates when it substituted the generic rates for the arbitrated rates, the Court will affirm the Board's decision not to adopt the AT&T - Bell agreement containing the arbitrated rates.

B. Technical Issues

In this lawsuit, the parties raise issues about the Board's decisions regarding dark fiber, subloop unbundling, shared two way trunking, customer specific pricing agreements, the number of interconnection points per LATA, and directory assistance databases. These are technical issues which relate to the realm of the possible. The Act obligates incumbents to make their network facilities available to competitors, in whole or in part, so that the competitor may offer local telephone service either by reselling services provided wholly by the incumbent's equipment, or by combining its own facilities with certain parts of the incumbent's network. Desiring the quickest and most efficient way to break into local phone service competition, MCI and AT&T each negotiated for access to certain services and elements of Bell's network which, when combined with their own facilities, would maximize capacity to provide service while minimizing costs. Their various approaches to creating new local networks required the Board to examine the technical feasibility of their requests and to define the boundaries of access to Bell's network under the Act. The Court will address in turn the parties' disputes regarding how the Board resolved these technical issues.

1. Dark Fiber

"Dark" fiber is fiber optic cable laid in the ground that is capable of carrying telecommunications traffic through pulses of light, but is not yet "lit," that is connected to the network's electronic equipment required for transmission. As a prospective measure, Bell installs dark fiber over time as spare capacity for future traffic. Because dark fiber is by definition not yet lit, it is possible for a competitor to connect the cable to its own network and light it, saving the competitor both the time and expense of laying its own cable. On this theory MCI requested that Bell lease some of its dark fiber for interconnection with MCI's network.

Section 251(c)(3) of the Act obligates ILECs like Bell to provide "access to network elements on an unbundled basis at any technically feasible point[]." A "network element" is defined under the Act as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). Since dark fiber is fiber optic cable that is not currently in use, the Board held it was not a network element and need not be provided to MCI on an unbundled basis. Generic Order at 113. MCI challenges that decision before this Court.

While MCI's petition was pending here, the FCC issued its Third Report & Order regarding local service competition on November 5, 1999 which materially affects some of the issues in this case. See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report & Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("Third Report & Order"). The FCC Order responded to the Supreme Court's January 1999 decision in AT&T v. Iowa Utilities Bd., 119 S.Ct. 220 (1999), which rejected the FCC's list of specific network elements which ILECs were obligated to unbundle for failure to determine whether access to certain proprietary elements was "necessary" and whether CLECs would be "impaired" without such access which the Act requires under §251(d)(2). In its Third Report & Order, the FCC has analyzed dark fiber under the "necessary and impair" standard and has held that it is a network element which must be provided to CLECs on an unbundled basis. Third Report & Order ¶¶ 152-153. The FCC has the authority to make regulations implementing the Act under §251(d)(1), and unless they are specifically challenged and overturned by a court of competent jurisdiction, the regulations have the force of law which binds this Court. See Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219-20 (1981).

As a consequence, then, this Court reverses the Board's decision on dark fiber and remands the December 2, 1997 Generic Order to the Board for further proceedings consistent with this Opinion and the FCC's Third Report and Order.

2. Subloop Unbundling

The "local loop" is the portion of the network that connects a customer's premises to the telephone company's local office or switch. The local loop can be divided into three component "subloop" parts: loop distribution, loop feeder, and loop multiplexer. "Loop distribution" is the portion of the local loop that connects to an individual customer's premises; multiple distribution lines are gathered and concentrated into a lesser number of "loop feeder" lines that run to the local office or switch. The "loop multiplexor" is the point where the distribution lines join the loop feeder lines, which is why the multiplexor is also known as the "feeder distribution interface," or FDI. The First Report and Order of the FCC listed the complete local loop as a network element that must be unbundled pursuant to §251, but did not identify subloop parts as separate network elements for unbundling, leaving the individual state utility commissions to decide that issue on a case by case basis.

In this case, MCI had enough equipment in place that it needed only the loop distribution portion to complete its own local loops, and so it requested that Bell lease it loop distribution on an unbundled basis. Despite the Board's finding that such subloop unbundling would certainly lower a CLEC's cost of providing service, the Board denied MCI's request on the grounds that "unbundling has yet to be demonstrated to be technically feasible" and because it feared that leasing of subloop parts might "remove the incentive for CLECs to construct complete local loops. . . ." Generic Order at 107. MCI challenges the Board's ruling to this Court.

As with dark fiber, discussed *supra*, the FCC's Third Report and Order addressed the issue subloop unbundling. Employing the "necessary and impair" standard, the FCC found that "lack of access to unbundled subloops materially diminishes a requesting carrier's ability to provide services that it seeks to offer." Quite contrary to the Board's reasoning, the FCC held that access to subloop elements would more likely stimulate than stymy the development of competitive loops. Third Report and Order ¶¶ 205, 209, 215. The FCC ruled that ILECs must provide access to subloops nationwide where technically feasible, naming some specific locations where such collocation is feasible: the pole or pedestal where the distribution line connects from the customer to the network; the network interface device (NID) or minimum point of entry to the customer premises (MPOE) which connects the loop to inside wiring; the feeder distribution interface (FDI) which may be located in a utility room, at a remote terminal, or in a controlled environment vault; or at the main distribution frame in the incumbent's central office. Third Report and Order ¶¶ 205-206.

The FCC acknowledged that these points of interconnection may not be "technically feasible" in every case because the physical structure of the local loop will vary depending on the location and the state. Third Report and Order ¶¶ 220-222. In order to accommodate such anomolies and at the same time maintain a national standard, the FCC established "a rebuttable presumption" that the subloop can be unbundled at those points identified above. Id. at ¶ 223. If the parties can't reach a voluntary agreement regarding subloop access as provided under §§ 251(c)(1) and 252(a)(2), then the incumbent bears the burden of demonstrating that collocation at those points is spacially or technically infeasible through an arbitration under §252. Id. at ¶226.

The FCC thus mandates subloop unbundling unless the incumbent can prove *infeasibility*. This ruling supersedes the Board's decision not to unbundle subloops until competitors prove *feasibility*, and so the Court will reverse the Board's decision. See Anderson Bros. Ford, 452 U.S. 205, 219 (absent some obvious repugnance to the statute, the agency's regulation implementing legislation should be accepted by the courts). The Court remands the December 2, 1997 Generic Order to the Board for further proceedings consistent with this Opinion and the

FCC's Third Report and Order.

3. Shared Two Way Trunking

AT&T, MCI, and the Ratepayer favor "shared" two way trunking, an arrangement which allows the CLECs to share the ILEC's trunk group, or run its calls over the same lines as Bell. Shared trunks would reduce the initial investment that a CLEC would need to make and presumably speed their entry into the local market. Generic Order at 103. Bell preferred that the CLECs purchase their own dedicated two way trunks for their exclusive use. Bell claims that traffic patterns in a shared arrangement are not yet predictable and might result in service degradation. Persuaded by Bell's arguments and concluding that the FCC Order did not require shared trunking, the Board found that ILECs would not have to share their trunks and that CLECS should be permitted to construct their own trunks. Generic Order at 104.

The Court cannot say that the Board's decision in this respect was inconsistent with the Act, nor was it arbitrary or capricious. The FCC spoke to this issue in its First Report and Order, and ordered that incumbents accommodate two-way trunking wherever a leasing competitor does not carry enough traffic to justify separate one-way trunks. In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report & Order, CC Docket No. 96-98, FCC 96-325, ¶219 (rel. Aug. 8, 1996) ("First Report and Order"). Neither the Act nor the Order requires incumbents to provide shared two-way trunking, and while a state may require more access than that mandated by the Act, it is not required to do so. The Board's decision in denying shared two way trunking is affirmed.

4. Customer Specific Pricing Agreements

In addition to allowing competitors to lease parts of an incumbent's network, the Act allows competitors to enter the market without any network at all, simply by purchasing full telecommunications services from the incumbent at wholesale rates and reselling them to customers at retail rates. §251(c)(4). Wholesale rates are "the retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collections, and other costs that will be used by the local exhange carriers." 47 U.S.C. §252(d)(3). In keeping with the directives of the FCC's Local Competition Order at ¶ 908, the parties submitted "avoided cost" studies to the Board in the generic proceeding. The Board found that in Bell's case, those avoided costs justified a wholesale discount rate of 17.04% for resellers using Bell operator services and 20.03% for those resellers using their own operator services. Generic Order at 202.

Raised on review before this Court is the Board's authority to restrict the application of wholesale rates to certain services, in particular to Customer Specific Pricing Arrangements (CSPAs). CSPAs are special lower rates generally offered to large business customers based on volume. Competitors argue that these special rates must also be offered to them at wholesale rates like any other telecommunications service under §251(c)(4). Incumbents argue that they are only able to offer such discounts based on the particular characteristics of a customer, and it would be unfair to allow competitors to purchase services at those rates and resell them to customers who did not have the same needs or profile of the CSPA customer.

But the Act and the FCC have spoken definitively on this issue, and so even discounted rates arrived at by specific customer contracts must be offered to competitors for purchase with the wholesale rate:

Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale

> rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs.

First Report and Order ¶ 948. In determining that even contract pricing is not wholly exempt from the requirement to offer services at wholesale rates, the FCC specifically addressed the incumbents' argument regarding the uniqueness of CSPAs:

> We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. *The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.*

First Report and Order ¶ 951 (emphasis added). Thus the FCC created the opportunity for an incumbent to make a showing at the state level that under a particular CSPA, avoided costs were different than those itemized for regular retail pricing, and that the wholesale rate should be adjusted accordingly. And so, while the FCC did not restrict the application of wholesale rates to CSPAs under §251(c)(4), it did give some discretion to the states in setting those rates:

> Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerate the potential anticompetitive effects. *We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions*, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

First Report and Order ¶952 (emphasis added). So the question before the Court is whether the Board's restriction on the resale of CSPA rates in this case is consistent with §251(c)(4) of the

Act.

In its Generic Order, the Board found the following restriction applicable to CSPA's:

> Customer specific pricing arrangements must be made available at wholesale rates to similarly situated customers with similar cost profiles and pricing will be determined on an individual case basis. . . . The Board **ORDERS** that within one week of the date of this order the ILEC provide the cost summaries for its customer specific pricing contracts. The summaries shall, at a minimum, include for each such offering, a statement of the services provided, price, volume commitment, termination liability and contract term. Once the reseller identifies the contract, the ILEC can discuss relevant information with the reseller to determine if the customer is "similarly situated" to the original purchaser. If a CLEC does not find this process to generate the apporpriate information in order to effectively compete for services, they can utilize the dispute resolution process....

Generic Order at 211-212. The Board and Bell have argued to this Court that this restriction is an appropriate exercise of discretion under the Act and the FCC's Order. The Board's decision appears to restrict the availability of wholesale discounts to CSPA rates to those instances where competitors propose to sell to a "similarly situated customer." That is, customers with similar service requirements, volume commitments, termination liability and contract terms.

The Court cannot say that the Board abused its discretion in establishing a fact-finding process to set the appropriate wholesale discount for individual CSPAs, particularly since the FCC stated at ¶¶ 951 and 953 that incumbents may demonstrate that avoided costs differ between regular retail rates and CSPA rates. But the Court finds that the process defined above may produce results that violate the Act with respect to "similarly situated" customers and volume requirements. While leaving some restrictions within the states' discretion, the FCC Order explicitly prohibits a restriction that the individual end users meet the volume requirement to be eligible for the CSPA rate:

> With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in the aggregate, under the relevant tarriff, meets the minimal level of demand. [. . .] We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. . . . [I]n calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

First Report and Order ¶ 953. Under the Board's procedure, it appears that a competitor may not be able to aggregate the usage of several small companies to qualify for the rate given to larger companies, because the small companies would not by themselves be "similarly situated" to the larger company receiving the CSPA rate. See FCC Amicus brief at 21-22. To deny a competitor a CSPA rate at wholesale solely because their customers did not individually meet the volume requirement, even if they could in the aggregate, would be inconsistent with the Act. The FCC has stated that such restrictions are presumptively unreasonable.

That is not to say that all restrictions on volume requirements would violate the Act. See In re Application of BellSouth, et al., CC Docket No. 98-121, FCC 98-271, ¶317 (rel. Oct. 13, 1998)("There may be, however, reasonable and non-discriminatory economic justifications for certain narrowly-tailored volume aggregation restrictions such as, for example, geographic limitations on the location of lines, where economically relevant. . . . These would constitute exceptions to our conclusion regarding volume aggregation"). But the Board's restriction here that customers be "similarly situated" in volume requirements is broad and unspecified. Whether this process would actually deny a competitor the ability to aggregate volume cannot be known until competitors actually request such services for resale, and the parties avail themselves of the dispute resolution process. Because this could happen, the Board must specifically address the issue of volume aggregation in its procedure for reselling CSPAs. Having found that the Board's procedure as it currently reads may deny competitors the right to purchase CSPAs at wholesale rates, the Court remands this issue for further proceedings consistent with this Opinion.

5. Number of Interconnection Points Per LATA

Interconnection refers to the physical linking of two networks for the mutual exchange of traffic. Generic Order at 101, citing First Report and Order ¶ 176. Interconnection permits the completion of calls across competing networks, thereby eliminating the need for CLECs to build facilities to each and every customer. Generic Order at 101. Section 251(c)(2)(A) requires ILECs to provide the CLECs with the facilities and equipment necessary to interconnect to the ILEC network, and § 251(c)(2)(B) requires that the interconnection take place at any technically feasible point within the ILEC network. In its First Report and Order, the FCC listed six points at which interconnection was demonstrated to be technically feasible. First Report and Order ¶ 212.

A LATA, or local access and transport area, is the specific geographic area within which all calls are considered "local." See 47 U.S.C. § 153(25). During the generic proceedings, MCI sought a single interconnection point (IP) per LATA, while AT&T argued for a *minimum* of one interconnection point per LATA. Generic Order at 102. Both AT&T and MCI argued that as CLECs, they should be able to choose the placement of the interconnection point so they could create the most efficient network. Id. Bell, while agreeing that a CLEC should be able to choose its most efficient interconnection point, did not want to be compelled to accept the CLEC's choice. Id. Bell also argued that it should receive annual traffic forecasts of the CLECs for